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Spain


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1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in your jurisdiction and which agencies/bodies administer and enforce environmental law?

Article 45 of the Spanish Constitution establishes the right to benefit from an appropriate environment as an essential condition for the development of the individual, while establishing the duty to preserve it. Therefore, those who fail to comply with the obligation to use natural resources rationally and to conserve nature will be obliged to repair the damage caused, regardless of the administrative or criminal penalties that may also apply.

In Spain, powers over environmental issues are shared between three authorities: the state; the autonomous regions; and the municipalities.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

In Spain, competence over environmental matters is shared between:

(i) The state, which enacts basic environmental legislation and implements control over certain environmental aspects affecting more than one autonomous region, such as the greenhouse gas (GHG) emissions trade scheme, or the authorisation or environmental assessment of certain activities with interregional impacts. State powers are generally exercised through the Ministry for Ecological Transition and the Demographic Challenge.

(ii) The autonomous regions, which may approve additional rules for stricter protection and are responsible for their enforcement. As a result, autonomous regions are usually the authorities responsible for the granting of main environmental permits (e.g. the integrated environmental authorisation), conducting environmental impact assessments, inspecting compliance with the applicable regulations or sanctioning any infringement. These powers are exercised through bodies equivalent to state ministries.

(iii) Municipalities, whose powers on environmental issues relate to municipal environmental permits, urban waste and noise limits. These powers must be executed in accordance with the regulations issued by the state and the autonomous regions.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

Law 27/2006, of 18 July, on the Right to have Access to Information, Public Participation and Access to Justice in Environmental Matters, is the standard which sets out the rights and obligations related to providing environmental information.

In general terms and according to this rule, irrespective of his consideration as an interested party, any person has the right to access environmental information held by public authorities. The exceptions to this rule are listed in Article 13 of the Law (e.g. a request is too general or irrational, referred to non-concluded materials, internal communications, etc.). They are subject to restrictive interpretation.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

Environmental permits are required in order to carry out activities that entail environmental impact. The type of permit would vary depending on the level of potential impact on the environment of each activity. Both national and regional regulations often include a list of specific activities that are subject to different environmental authorisations depending on its own technical characteristics and their environmental impacts.

In general terms, all environmental permits can be transferred to third parties. This transfer may be subject to prior communication to the authorities. That is the case, for instance, with integrated environmental authorisations according to Royal Decree 1/2016, of 16 December, approving the consolidated text of the Law 16/2002, of 1 July, on Integrated Pollution Prevention and Control.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

Any relevant decision of the authorities may be appealed before the administration or before the courts. In general terms, if there is a higher authority to that which issued the resolution, an administrative appeal must be filed before said higher authority. If there is no higher authority, or if such an appeal has already been dismissed, a jurisdictional appeal must be filed before the courts.

The general legal regime applicable in this respect is contained in Law 39/2015, of 1 October, of the Common Administrative Procedure of the Public Administrations, for administrative appeals, and Law 29/1998, of 13 July, Regulating the Contentious Jurisdiction, for judicial appeals.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

Yes. Highly polluting industries are subject both to environmental impact assessments before their execution and to periodic monitoring and reporting obligations while in operation.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

Failure to comply with applicable regulations or with the conditions stipulated in permits may lead to disciplinary proceedings and the imposition of sanctions. Among others, sanctions may consist of fines, temporary or permanent closure of premises, suspension of the activity, publication of the penalty, the suspension or withdrawal of authorisations or prohibition to contract with the public sector or to receive public subsidies. In addition, environmental restoration obligations may also be imposed.

Moreover, in certain cases, the violation of permits may lead to criminal liability, applicable to natural and legal persons.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

Article 3.a of Law 22/2011, of 28 July, on Waste and Polluted Soils, defines waste as any substance or object that the possessor disposes of or has the intention or obligation to do so.

The Law distinguishes between different types of waste, such as hazardous, domestic, commercial, industrial and biowaste. Each category is subject to specific duties. For instance, the production of hazardous waste is subject to prior communication to the relevant authorities and registration within a Public Registry, and its treatment is subject to specific authorisations or the request of financial guarantees.

On the other hand, there are specific regulations applicable to waste from electrical and electronic equipment (WEEE), waste batteries, waste from construction and demolition works, etc.

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

Non-hazardous waste may be stored at the place of production for a maximum of two years when destined for recovery, and up to one year when destined for disposal. In the case of hazardous waste, the maximum storage period is reduced to six months. In exceptional cases, the regional competent authority may extend that period.

On the other hand, in general terms, a producer of waste is obliged to hand the waste to an authorised waste manager. If the producer wants to dispose of the waste itself, it must be specifically authorised to do so.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/ disappears)?

No, provided that the waste producer delivers the waste to an authorised waste manager in full compliance with the applicable regulations. In these cases, its liability ends with such delivery.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

Law 22/2011 establishes the extended producer responsibility scheme. This regime sets out the responsibility of the manufacturer of a product throughout its useful life, including when it becomes waste. It therefore imposes obligations on the producer for the take-back, recycling and final disposal of the waste.

In addition, take-back obligations apply for certain types of waste. For instance, Royal Decree 110/2015, of 25 February, on WEEE, among other obligations, stipulates the obligation of the distributors to take back the WEEE.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

Failure to comply with environmental regulations may give rise to:

(i) Administrative liability. In general terms, administrative liability leads to the imposition of sanctions, as described in question 2.4. Sanctions may only be imposed after disciplinary proceedings, in which the alleged offender has the right to be heard. The defences vary for each case depending on the circumstances. This notwithstanding, possible defences may consist of the exceedance of the limitation period applicable (as a general rule, these periods are three years for very serious offences, two years for serious offences and six months for minor offences (Law 40/2015, of 1 October, on the Legal Regime of the Public Sector)), the lack of sufficient evidence supporting the infringement, or the violation of the proportionality principle.

(ii) Criminal liability. Articles 343 and 345 of the Spanish Criminal Code, among others, sanction environmental breaches. The defences vary for each case depending on the circumstances; however, companies may defend themselves by evidencing that they have approved and correctly implemented compliance policies. Furthermore, as mentioned above, another potential defence is the elapse of the limitation period, which for basic environmental crimes is, in most cases, five years.

(iii) Environmental liability. When there is damage to the environment or the risk of such damage, environmental liability arises. Under Law 26/2007, of 23 October, on Environmental Liability, operators must restore any environmental damage as well as implement any measure required to avoid or minimise the environmental damage.

(iv) Civil liability. This arises when damage is caused to a third party as a consequence of an environmental damage (e.g. the decrease of value of a soil after its pollution). The general limitation period applicable in this case is five years for personal actions and one year for non-contractual actions.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

Yes. Compliance with the requirements, precautions and conditions laid down in the Laws or stipulated in the authorisations shall not exempt operators from environmental liability, according to Article 9.1 of Law 26/2007.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Yes. The directors and officers may be considered responsible when their actions or omissions have been decisive for the wrongdoing or when the company has ceased operations, and there are outstanding duties and obligations caused by them (Article 13 of Law 26/2007). They may also be held liable in relation to criminal and civil liability.

With regard to administrative offences, the general rule is that the party liable is the company within whose authority the offence has been committed, and not its directors and officers. Nevertheless, there are certain exceptions under which directors may be held administratively liable (e.g. Law 22/1988, of 28 July, on Coasts or the Law on Industry).

Furthermore, directors and officers may acquire insurance to protect themselves against liability.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

The acquisition of shares entails that all environmental liabilities are assumed by the buyer. On the contrary, asset purchases may reduce the liabilities of the buyer, as the acquirer would not be responsible for the environmental infringements of the seller; the assets transfer would require the transfer or obtaining of the environmental permits in order to carry out the activity.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

As a general rule, lenders are not liable for environmental wrongdoing or remediation costs assigned to their borrowers. This notwithstanding, there may be exceptions. For instance, Law 26/2007 may entail a lender severally liable if the powers exercised by the lender are so intense that the lender has a decisive economic power in the technical operation of the activity or may be considered a *de facto* administrator.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

Law 22/2011 and Royal Decree 9/2005, of 14 January, which establishes the relationship of potentially polluting activities of the soil and the criteria and standards for the declaration of polluted soils, contain the legal regime applicable to soil pollution. According to these regulations, in case of soil pollution, the first obliged to repair the damage is the polluter, followed by the owners and the possessors of the soil, in that order. This is a regime of strict liability, in which restoration obligations may be imposed regardless of culpability or even connection with the cause of the pollution.

5.2 How is liability allocated where more than one person is responsible for the contamination?

When there are several polluters or when the liability between them cannot be determined, all are jointly and severally liable (Article 26 of Law 22/2011).

5.3 If a programme of environmental remediation is "agreed" with an environmental regulator, can the regulator come back and require additional works or can a third party challenge the agreement?

Yes. In order to avoid the declaration of a soil as polluted, a voluntary remediation plan may be filed before the authorities (Article 38 of Law 22/2011). However, its approval does not prevent the authorities from demanding additional works if those approved do not suffice in order to remove the unacceptable risk identified in the soil.

Third parties may challenge the agreement, provided that they have a legitimate interest or in the exercise of class action (see question 8.5 for class action). This is established by Law 29/1998, in relation to Law 27/2006. Law 29/1998 ensures that citizens can participate in the process of achieving real and effective environmental protection.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

Yes, the owner or possessor obliged to restore polluted soil may seek compensation from the polluter by means of a civil action. Private agreements regarding the assignment of liability and obligations in this respect are valid.

However, any agreement reached by the parties in relation to soil pollution liability will only be enforceable between the parties. The authorities could impose soil remediation obligations to any party (i.e. polluter, owner or possessor), irrespective of the private agreements reached between them.

5.5 Does the government have authority to obtain from a polluter, monetary damages for aesthetic harms to public assets, e.g. rivers?

Spanish regulations do not provide any specific protection regime for aesthetic harms to public assets. As a result, the general regime on environmental liability applies. Please note that this general regime is aimed more to achieve environmental restoration than to obtain monetary damages.

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

Operators of any activity that may have an environmental impact is subject to monitoring and control from the authorities.

In general terms, the authorities have all the powers required in order to confirm the compliance with applicable regulations and the terms stipulated in the permits obtained. This includes, for instance, the obligation to draft periodic reports on the activity (wastewater discharge, waste production, gas emissions, etc.) or even to conduct site inspections. Hindering the inspections may be considered a serious or very serious infringement.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

Yes. Any environmental damage identified on a site must be disclosed to the authorities. In this respect, Law 26/2007 obliges operators to inform the authorities immediately as soon as they become aware of environmental damage or risk of environmental damage. Failure to comply with this obligation may lead to liability.

On the other hand, there may be an obligation to disclose the existence of pollution to third parties, especially when such communication is required in order to prevent damage to health or the environment.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

Operators of potentially polluting activities of the land, included in Royal Decree 9/2005, have the obligation to draft and file before the authorities a report on the soil status, which must be updated periodically. In addition, this obligation also applies to owners of potentially polluted soils who want to change the use of the soil or establish a different activity (Article 3 of the Royal Decree).

Furthermore, the activities subject to integrated environmental authorisation which use, produce or emit hazardous substances must submit a 'base report' with information on the state of land and groundwater contamination before the commencement of its activity (Article 12.f of Royal Legislative Decree 1/2016).

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

As mentioned in question 7.1, in general terms, environmental damage must be disclosed to the authorities. Furthermore, financial statements must include and make public a chapter on environmental information, such as expenditure incurred in environmental protection, environmental risks assured, and pending judicial proceedings affecting the company, contingencies or investment owing to environmental reasons.

In addition, Article 32 of Law 7/2021, of 20 May, on Climate Change and Ecological Transition, establishes the obligation of listed companies, credit entities or insurance companies, among others, to include in their management annual report an analysis on the financial impact of the risks associated with climate change generated by the exposure of their activity to climate change, including the risks of the transition to a sustainable economy and the measures taken to address these risks. Furthermore, from 2023 on, credit entities must publish decarbonisation objectives for their investment and loan portfolios.

In relation to disclosure to prospective purchasers, there is no legal provision detailing the particular disclosure obligations applicable. This notwithstanding, the Spanish Civil Code imposes the obligation to negotiate in good faith. As a result, if an environmental problem is identified after a transaction, it may be terminated on the basis of the existence of hidden defects or a defective consent (without prejudice of the liability regime stipulated in the contract).

Furthermore, in relation to soil, owners who have carried out potentially polluting activities are obliged to declare this circumstance in the public deed transferring rights over the soil (Article 33 of Law 22/2011).

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

The administrative legal regime applicable in relation to environmental liability cannot be altered by private agreements. Therefore, the authorities will always be able to impose liability to the person required by law.

However, parties may assign liability among them and agree indemnity clauses. This allows for limitation of the risk exposure and guarantees the recuperation of any cost imposed by the authorities.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

No, it is not possible to exclude environmental liability from the balance sheet as it must be treated and recorded like any other contingency. In particular, the Spanish General Accounting Plan obliges to account a provision for future expenditures to repair damages to the environment, even if it has not been determined and quantified yet.

In case of liquidation, pending environmental liabilities will be transferred to shareholders up to the value of the corresponding liquidation quota and other patrimonial earnings received during the two years prior to the liquidation. Furthermore, in case certain conditions are met, criminal liability for attempting to escape from liability cannot be totally ruled out.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

In general terms, shareholders cannot be held liable for pollution caused by the company. Shareholders' liability is limited to their participation in the share capital. However, a shareholder may be held liable if he is a *de facto* administrator (see above question 4.5).

As a general rule, Spanish courts are not able to resolve environmental damage caused abroad by foreign companies, even if they are Spanish subsidiaries or affiliates. However, in order to confirm that this conclusion is applicable to a specific case, an analysis on the particular circumstances at stake would be needed.

8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?

Yes, whistle-blowers are protected, provided certain requirements are met: (i) evidence of the offence provided by the whistle-blower suffices to confirm it or to initiate sanctioning proceedings against the rest of the offenders; (ii) by the time of the complaint, the authorities must have enough grounds to initiate sanctioning proceedings; and (iii) the damage must be repaired. In such event, Article 62.4 of Law 39/2015 states that the authorities must exempt from administrative sanctions the first complainant participating in the commission of an offence.

If the aforementioned requirements are not fully met, the authorities must reduce the sanctions to be imposed if the whistle-blower provides evidence that implies a significant added value to the evidence that the authorities had. In either case, protected whistle-blowers must cease their participation in the offence and must not have destroyed any evidence related to the offence.

There is no protection for whistle-blowers in the event of criminal offences.

8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?

Certain environmental associations can file administrative and judicial appeals against environmental decisions made by the authorities (e.g. the granting of a permit, the conclusions of an environmental impact assessment, etc.) without the need of evidencing any particular interest in the matter. Likewise, interested parties may group together in order to file an appeal.

Spain's legal regime does not allow for criminal or exemplary damages. Liability must be imposed only as compensation of the damage caused.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

Yes. According to Law 1/1996, of 10 January, on Free Legal Aid, certain environmental associations declared to be of public benefit may benefit from an exemption from liability to pay costs when litigating (they may be exempt from paying the cost of proceedings, court fees or appeal deposits).

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in your jurisdiction and how is the emissions trading market developing there?

Spain, as a signatory to the Kyoto Protocol and the Paris Agreement, is committed to reducing GHG emissions.

Furthermore, as an EU Member State, Spain is part of the EU emissions trade scheme under EU Directive 2003/87/EC, implemented in Spain by means of Law 1/2005, of 9 March.

In summary, the EU trade scheme implies that every facility under Law 1/2005 must obtain a GHG emission authorisation granted by the autonomous regions and must annually deliver GHG emission allowances per each equivalent tonne of carbon dioxide emitted from its facility (or aircraft). Emission allowances are transferrable and registered within an Emissions Trading Registry and remain valid during each trading period. The current trading period started on January 2021 and will end on 31 December 2030 (phase IV). Emission allowances may be allocated by means of auction (which is aimed to be the main method of allocation) or by free allocation (which is especially relevant for facilities exposed to significant risk of carbon leaks).

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Yes. The Fourth Additional Provision of Law 1/2005 exempts small-scale installations – those that emit less than 25,000 tonnes of equivalent carbon dioxide and combustion plants with a rated thermal input below 35 MW – and hospitals from the previous regime. In these cases, an alternative scheme is envisaged in Royal Decree 17/2019, of 22 November, which defines the mitigation measure equivalent to participation in the emission trading scheme. This regime imposes a minimum 32 per cent reduction of emissions by 2025, compared with 2005 levels.

In addition, Royal Decree 18/2019, of 25 January, excludes installations with less than 2,500 tonnes of equivalent carbon dioxide from the emissions trading scheme. However, they are required to monitor and report their GHG emissions.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

Spain is committed to fulfilling its international commitments on climate change. The new Law 7/2021 is aimed to ensure Spain's compliance with the objectives derived from the Paris Agreement and to facilitate the decarbonisation of the Spanish economy and its transition to a circular model.

Law 7/2021 establishes that by 2050, Spanish economy must be carbon neutral and sets up the following targets for 2030: a 23 per cent reduction in GHG emissions compared to 1990 levels; a 42 per cent of total energy consumption coming from renewable sources; a 74 per cent of renewable energy in the electricity sector; and an improvement of 39.5 per cent in energy efficiency.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Regulations demand the removal of any asbestos-containing material (AMC) at the end of its useful life and the prohibition to use AMC in the future.

Civil, criminal or administrative liability may arise due to the presence of AMC.

This notwithstanding, at the time of writing, litigation has mainly been referred to civil liability: contractual; and extra-contractual. In particular, contractual civil liability has been recognised for workers affected by the inhalation of asbestos particles on the assumption that the employer did not take the due diligence required to avoid potential damage. Furthermore, family members of workers who have been directly affected by asbestos (mainly women who cleaned their husbands' suits) have been recognised as victims of extra-contractual civil liability.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on-site?

AMC must be removed in compliance with the health and safety measures required by Royal Decree 396/2006, of 31 March,

which establishes the minimum requirements for safety and health applicable to works with risk of exposure to asbestos, when they reach the end of their useful time as they release asbestos fibres. Before that, owners or occupiers are not required to remove AMC but must only monitor its status to assure that there is no risk for human health or the environment.

These obligations would also apply in case of demolition or the decommissioning of buildings containing AMC.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in your jurisdiction?

Initially, civil liability insurances were used to insure environmental risks. Later, as a result of Law 26/2007 obliging certain activities (those referred to in Annex III) to be covered by financial guarantees, such as insurance, specific environmental insurances were implemented in the market. These insurances require a maximum risk analysis of the activity.

As at the time of writing, the number and relevance of environmental insurances have increased, both between operators who are obliged to subscribe for it and those who do so voluntarily.

11.2 What is the environmental insurance claims experience in your jurisdiction?

Currently, we have no news on relevant environmental insurance claims as these types of insurance have been recently issued and the provisions of Law 26/2007 have been applied on a limited basis.

12 Updates

12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in environment law in your jurisdiction.

New Spanish environmental policies are aligned with international trends (e.g. the United Nations Framework Convention on Climate Change and the EU's provisions).

This notwithstanding, it can be highlighted that:

(i) The Bill on Waste and Polluted Soils, which aims to fulfil the objectives set out by the Circular Economy Package Directives, is currently being processed before the Spanish Parliament. Its entry into force is expected for 2022.

(ii) Within the framework of the EU Next Generation Plan, it is expected that an important part of the funds will be allocated to plans, programmes and projects aiming at a climate-neutral, sustainable, circular and resource-efficient economy.

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